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fact sheet

employment standards act

HOW TO FILE A CLAIM

What is the purpose of the *Employment Standards Act, 2000 (ESA)*?

The *ESA* sets out the rights of employees and requirements that apply to employers in most Ontario workplaces.

What work is not covered by the *ESA*?

Most employees and employers in Ontario are covered by the *ESA*. However, the *ESA* does *not* apply to certain individuals and persons or organizations for whom they may perform work, including:

- Employees in sectors that fall under federal jurisdiction, such as airlines, banks, the federal civil service, post offices, radio and television stations and inter-provincial railways
- Individuals performing work under a program approved by a college of applied arts and technology or university
- A secondary school student who performs work in a work experience program authorized by the school board that operates the school in which the student is enrolled
- People who do community participation under the *Ontario Works Act, 1997*
- Police officers (except for the Lie Detectors part of the *ESA*, which does apply)
- Inmates taking part in work or rehabilitation programs, or young offenders who perform work as part of a sentence or order of a court
- People who hold political, judicial, religious or elected trade union offices.

Employees of the Crown are excluded from some (but not all) provisions of the *ESA*.

For a complete listing of other job categories not governed by the *ESA*, please check the *ESA* and its regulations. Regulations set out exemptions to the law, special rules and details about how to apply certain sections of the *ESA*.



QUALIFYING TO FILE A CLAIM

Who can file a claim under the *Employment Standards Act (ESA)*?

Most employees covered under the *ESA* may file a claim with the Ministry of Labour if they believe their employer is not complying with the law.

Are there any exceptions to the usual rules about who can file a claim?

There are two situations in which an employee who is covered by the *ESA* can't file a claim with the Ministry of Labour.

- Generally speaking, employees represented by a union can't file a claim. These employees—if they are covered by a collective agreement and whether or not they are actually *members* of the union—must use the grievance procedure contained in the collective agreement between the employer and the trade union.
- Employees who have already started a *court action* against an employer for the failure to pay wages or discrimination in benefit plans can't file a claim with the ministry for the same matter. Also, employees who have started a court action for wrongful dismissal cannot file a claim for termination or severance pay under the *ESA* for the same termination. (See “*Can an employee file a claim and then go to court?*” later in this fact sheet.)

RIGHTS AND RESPONSIBILITIES

What can employees do if they think their employer hasn't followed the *ESA*?

Employees who believe that their employer or former employer hasn't followed the *ESA* are encouraged, when appropriate, to discuss the matter with the employer—or with their union representative, if they have one.

Or they may want to send the employer a letter explaining the problem and asking to have it resolved. Employees who need help writing the letter can contact the Ministry of Labour for assistance, and should keep a copy of the letter and the mailing receipt.

However, sometimes it's better to contact the Ministry of Labour directly, either in person or by telephone, to discuss the situation.

After hearing an employee's complaint, an employment standards officer may recommend that he or she file a claim with the ministry—a form that contains a written statement of the employee's concerns, as well as other important information about the employer and the employee's complaint.

How does an employee file a claim?

To file a claim, an employee must complete the claim form, which can be obtained from a Ministry of Labour office, or a Government Information Centre. It can also be printed from the Ministry of Labour website at www.gov.on.ca/lab/.

Employees may visit the nearest ministry office to file the claim. Experienced ministry staff will be able to provide information as well as assistance with filling out the claim form.

What information does an employee need to file a claim?

An employee needs to provide certain details about the employer and his or her employment when filing a claim. The employee will be asked to provide some or all of the following:

- Social Insurance Number
- copies of pay stubs or paycheques
- copies of T4 slips
- a copy of his or her written notice of termination (if the employee's employment was terminated and/or severed by the employer and notice was given)
- a copy of the employee's Record of Employment, if received
- a copy of the contract of employment, if there is one
- copies of any warning letters or notices received
- a record of the hours worked if available (i.e., a calendar record, time sheets, attendance records, diary or notes).

In completing the claim form, the employee must give details about:

- what happened (i.e., the employer didn't pay overtime; a cheque "bounced"; the employee was let go)
- when it happened (dates and times)
- why it happened (i.e., why the employee was let go; why the employer didn't pay wages)
- who was involved (i.e., names of employer, manager, supervisor, bookkeeper)
- any witnesses or others who would support the employee's story
- what's being claimed (including dollar amounts, if applicable)
- how the employee tried to solve the problem with the employer (if the employee wrote to the employer, a copy of the letter and mailing receipt).

In addition, the employee will be asked to give information about the employer, such as:

- the employer's full address and telephone numbers
- the employer's bank (the bank employee cheques were drawn on)
- whether the employer is still operating
- whether the employer operates any other places of business.

Can an employee file a claim and not give his or her name?

If the employee doesn't want the Ministry of Labour to use his or her name or address during the investigation, the employee should discuss this with ministry staff when the claim is being filed.

What is the maximum amount of money that can be claimed?

With some exceptions, \$10,000 is the maximum amount the Ministry of Labour can order an employer to pay an employee.

However, this limit doesn't apply to claims under those parts of the *ESA* in which reinstatement and/or compensation can be ordered (for example, parts dealing with pregnancy, parental leave, emergency leave and family medical leave, the right of an employee not to be penalized for exercising his or her rights under the *ESA*, a retail employee's right to refuse to work a public holiday).

Is there a time limit on filing a claim?

Six-month/one-year time limit for recovering wages

With two exceptions, an employee must file a written claim with the Ministry of Labour within six months of the date the wages became due in order to try to recover them.

The first exception to this rule deals with vacation pay. Unpaid vacation pay may be recovered if the claim is filed within 12 months of the date the vacation pay came due (rather than six months).

The second exception is where an employment standards officer finds that an employer has violated the same section of the *ESA* more than once, with respect to an employee. If at least one of the violations occurred in the six-month period before the claim was filed, the employee will be entitled to recover the wages due for all violations of the same provision that occurred in the 12-month period before the claim was filed.

Generally, wages (except vacation pay) become due on the employee's regular pay day. However, if the employment was terminated by the employer, all the wages owed to the employee (including any unpaid vacation pay as of the date of termination) are due either within seven days of the termination, or on what would have been the employee's next regular pay day—whichever is later.

Vacation pay becomes due under the *ESA*:

- either on or before the day a vacation is taken,
- on the regular pay day for the period in which a vacation falls (if the employee is paid by direct deposit),
- on each pay day if the employee has agreed in writing to that arrangement for the payment of vacation pay, or
- at any other time as agreed to in writing by the employee.

See the “Vacation” Fact Sheet for further information about when vacations must be completed and when vacation pay is to be paid.

A typical case

Nhan was employed as a technician for just over three years. His employment was terminated because of a shortage of work on February 1. His next regular pay day would have fallen on February 12. Nhan was given proper notice of his termination but was not paid his last week's wages. On August 30 he visited the local office of the Ministry of Labour to file a claim for those wages. Nhan is not able to recover his last week's wages through the Ministry of Labour, because those wages became due more than six months before the date he filed his claim. Nhan might, however, be able to take court action to try to recover them.

Two-year time limit for filing a claim

The six-month/one-year limitations on recovery only applies to an employee's ability to seek recovery of unpaid wages, including vacation pay. In some cases, the employee has two years after a violation to file a claim with the Ministry. This two-year time limit applies where:

- The employee believes an employer has violated a *non-monetary* section of the *ESA*—for example, if the employer didn't give proper meal breaks, or failed to provide wage statements; or
- The employee is seeking compensation and/or reinstatement—for example, if the employer has penalized or threatened to penalize an employee for exercising rights under the *ESA*. These rights include:
 - asking the employer to comply with the *ESA*
 - asking questions about rights under the *ESA*
 - filing a complaint under the *ESA*
 - exercising or trying to exercise a right under the *ESA*
 - giving information to an employment standards officer
 - taking, planning on taking, being eligible or becoming eligible for an emergency leave, family medical leave, or parental or pregnancy leave
 - being subject to a garnishment order (i.e., to have a certain amount deducted directly from wages to satisfy a debt)
 - participating in a proceeding under the *ESA* or section 4 of the *Retail Business Holidays Act*
 - refusing to take a lie detector test
 - refusing Sunday work (for certain retail workers only).

Extending Time Limits

The six-month/one year and two-year time limits described above are set out in the legislation and are mandatory. However, it *may* be possible to make a claim that would otherwise be outside the applicable time limit if:

- an employee has been misled as to his or her entitlements under the *ESA* by his or her employer and for that reason delayed in filing his or her claim; and
- the employee took prompt steps to file a claim after he or she found out that what the employer said about the *ESA* entitlement was inaccurate.

For example, an employer has stated that no overtime is payable under the *ESA* to an employee in certain circumstances and the employee relies upon the employer's statement and does not file a claim for overtime until after he or she finds out from another source that overtime *is* payable under the Act. In such a case, an employment standards officer may rule that the time limit that would otherwise not allow all or a portion of the claim should be extended because the delay in filing the claim was caused by the incorrect statement of the employer about the employee's *ESA* entitlements.

How long does the claim process take?

This depends on the complexity of the case, and the caseload in the area of the province where the claim is filed. A claim will be processed as quickly as possible.

Can an employee file a claim and then go to court?

No. An employee can't file a claim with the Ministry of Labour for a failure to pay wages or discrimination in benefit plans and also go to court against the employer for the same matter. This applies even if the employee's claim is for more than the \$10,000 maximum of wages that an employer can be ordered to pay.

Furthermore, an employee who files a claim for termination or severance pay can't sue the employer for wrongful dismissal for the same termination of employment. Again, this applies even if the claim is for more than \$10,000.

An employee with questions about whether it's best to file a claim or to sue the employer in court may wish to consult a lawyer before filing a claim.

If an employee decides to start a court action for the same matter *after* filing a claim with the ministry, he or she should withdraw the claim within two weeks of the date of filing it to ensure that he or she will be allowed to start the court action.

What happens once a claim is filed?

All claims are investigated to see whether there has been a violation of the law. Here's what happens when a claim is filed:

- A formal investigation isn't usually started immediately. Instead, Ministry of Labour staff encourages the employee to resolve problems directly with the employer. They help the

employee identify and define issues, and suggest ways to resolve them. Sometimes a "self-help" kit is given to the employee.

- If there's no resolution, ministry staff informs the employer that a claim has been filed, and encourage the employer to resolve the matter.
- If the issue still can't be settled, the file is assigned to an employment standards officer for a full investigation.
- The employment standards officer conducts investigations by telephone, through written correspondence, by visiting the employer's premises and/or by requiring both the employee and the employer to attend a fact-finding meeting.

What is a fact-finding meeting?

A fact-finding meeting allows the employee and employer to present their cases to the employment standards officer investigating the claim. Both parties—or a representative of the employer if the employer is a corporation—may be required to attend the fact-finding meeting.

Here's what happens:

- The employee and/or the employer receive a formal notice that tells them the time, date and location of the meeting—and possibly, certain documents and records they must provide to the employment standards officer either before or at the meeting.
- At the fact-finding meeting, the employment standards officer asks the employee to state his or her concerns, and instructs participants to produce any information that was requested in the meeting notice. Parties are asked questions, and are invited to state their case and show relevant evidence.
- Parties may bring documents or information they believe will support their case, a lawyer or someone acting on their behalf, and sometimes, witnesses. It's advisable to contact the employment standards officer before the meeting if you are planning to bring witnesses.
- At the end of the fact-finding meeting, the officer is often able to give a decision. In some cases, the officer may need further information before making a final decision.

If an employer or an employee fails to attend a fact-finding meeting without good reason, the officer may choose to make a decision based on the evidence presented at or before the meeting.

What happens when an employment standards officer has made a decision?

After investigating a claim, the employment standards officer makes a decision about whether the employer has complied with the *ESA*.

If the officer finds that the employer has complied with the *ESA*:

- In cases where an employee has filed a claim with the Ministry of Labour, the employee is notified in writing of this decision, and can apply for a review within 30 days. (See *Can an employee or an employer appeal a decision?* later in this Fact Sheet.)

If the officer finds that the employer hasn't complied with the *ESA*:

- The employer may resolve the issue by voluntarily complying with the officer's decision (i.e., by paying money that's owing to an employee or employees, by changing workplace practices or by adopting new workplace practices).
- Officers can also require an employer to post a notice containing specific information about administration or enforcement of the *ESA*, and/or a copy of portions of the report with the results of the officer's investigation or inspection.

What if an employer doesn't voluntarily comply with the officer's decision?

If an employer is unwilling or unable to comply with an employment standards officer's decision, the officer can issue one or more of the following:

- an Order to Pay Wages (the employer must pay wages owed)
- a Compliance Order (the employer must take or stop certain actions so it is no longer violating the law)
- a Notice of Contravention (the employer must pay prescribed penalties for violating a section or sections of the *ESA*)
- an Order to Pay Compensation and/or Reinstate (for violations of rights related to emergency leave, family medical leave or parental and pregnancy leave, lie detectors, the right not to be penalized for exercising rights under the *ESA*, for example).

Employers may have the right to apply for a review (appeal). If an employer doesn't apply for a review within 30 days of the date an order was served or a notice was issued, the order or notice is final and binding on the employer. Where the employer has not paid the required amount, the file is typically sent to a private collection agency. The employer is required to pay the collection agency fees as well as the ministry's administrative fees.

Can an employee or an employer appeal a decision?

If employees or employers are dissatisfied with an officer's decision, they have the right to apply for a review (appeal). They must complete an Application for Review, setting out the facts and reasons for the application.

Employees

For employees, this application must be submitted within 30 days of being served with the letter advising of the officer's *refusal to issue* an order or notice.

An employee who files a claim can appeal:

- an officer's refusal to issue an Order to Pay Wages, an Order to Pay Compensation and/or Reinstatement or a Compliance Order.

An employee for whom an order has been issued (whether or not he or she filed a claim) can appeal:

- the amount of an officer's Order to Pay Wages or an officer's Order to Pay Compensation and/or Reinstate.

Employers

For employers, the application must also be submitted within 30 days of the date the order or notice is served.

Employers can apply for a review of:

- a Compliance Order (these don't require payment of wages or compensation)
- a Notice of Contravention (the employer doesn't have to pay the amount of the penalty before the hearing)
- an Order to Pay Wages (before a review is granted, the employer must pay the full amount of the order, plus the administrative fees, to the Director of Employment Standards in trust,)
- an Order to Pay Compensation and/or Reinstate (before a review is granted, the employer must pay the amount of the order up to a maximum of \$10,000 to the Director of Employment Standards in trust).

Reviews are conducted by an independent, quasi-judicial tribunal, the Ontario Labour Relations Board.

Can an employee's claim result in prosecution of an employer that won't comply with the ESA?

Any contravention of the *ESA* and regulations or failure to follow an order, direction or other requirement is an offence under the law.

Offences may be prosecuted, and if there is a conviction the offender may be subject to fines or imprisonment. The Ministry of Labour may choose to prosecute an employer or any other person who is in contravention of the *ESA*. Individuals if convicted of an offence can be fined up to \$50,000, imprisoned for up to 12 months, or both.

A corporation can be fined up to \$100,000 for a first conviction. If the corporation has already been convicted of an offence under the *ESA*, it can be fined up to \$250,000 for a second conviction. For a third or subsequent conviction, the corporation can be fined up to \$500,000.

This Fact Sheet provides general information about how to file a claim as set out in the *Employment Standards Act, 2000 (ESA)* and its regulations. For complete information please refer to the *ESA* and the regulations.

Need More Information?

If you have questions about the *Employment Standards Act*, call the Ontario Ministry of Labour's Employment Standards Information Centre at 416-326-7160 or 1-800-531-5551, or visit a Ministry of Labour office or Government Information Centre in person.

Here's how you can get written publications about the *Employment Standards Act*:

- Ministry of Labour website: www.gov.on.ca/lab
- Ministry of Labour Publications Sales unit: 1-800-809-4731

ESA Fact Sheets are available on the following subjects:

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| <input type="checkbox"/> Agricultural Workers | <input type="checkbox"/> Minimum Wage |
| <input type="checkbox"/> Domestic Workers | <input type="checkbox"/> Pregnancy Leave & Parental Leave |
| <input type="checkbox"/> Emergency Leave | <input type="checkbox"/> Public Holidays |
| <input type="checkbox"/> Family Medical Leave | <input type="checkbox"/> Retail Workers |
| <input type="checkbox"/> Frequently Asked Questions | <input type="checkbox"/> Role of the Ministry of Labour |
| <input type="checkbox"/> Homeworkers | <input type="checkbox"/> Termination of Employment & Severance Pay |
| <input type="checkbox"/> Hours of Work & Overtime | <input type="checkbox"/> Vacation |
| <input type="checkbox"/> How Are You Covered by the <i>ESA</i> ? | <input type="checkbox"/> What Young Workers Should Know |
| <input type="checkbox"/> How to File a Claim | |

*This Fact Sheet is provided for your information and convenience only. It is not a legal document. For further information and the exact wording in the *ESA*, please refer to the Employment Standards Act, 2000 (*ESA*) and regulations.*

Please call the Employment Standards Information Centre in the greater Toronto area at 416-326-7160, or toll-free outside Toronto at 1-800-531-5551.

Information on the *ESA* can also be found at the *Employment Standards Act* section of the Ministry of Labour's website: www.gov.on.ca/lab. You can order copies of the *ESA* and related information materials from:

- the Ministry of Labour's Publication Sales Unit at 1-800-809-4731;
- the Ontario government E-Laws website at www.e-laws.gov.on.ca or,
- Publications Ontario, 1-800-668-9938; hearing impaired TTY 1-800-268-7095.



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